No. 76-60

In the Supreme Court of the United States

OCTOBER TERM, 1976

DOLPH BRISCOE, GOVERNOR OF THE STATE OF TEXAS, ET AL., PETITIONERS

v.

EDWARD H. LEVI, ATTORNEY GENERAL OF THE UNITED STATES, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

ROBERT H. BORK,
Solicitor General,

J. STANLEY POTTINGER,
Assistant Attorney General,

CYNTHIA L. ATTWOOD,
Attorney,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-60

DOLPH BRISCOE, GOVERNOR OF THE STATE OF TEXAS, ET AL., PETITIONERS

v.

EDWARD H. LEVI, ATTORNEY GENERAL OF THE UNITED STATES, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A-1 to A-40) is reported at 535 F. 2d 1259. The oral ruling of the district court (Pet. App. B-1 to B-9) is not reported.

JURISDICTION

The judgment of the court of appeals (Pet. App. C-1) was entered on April 19, 1976. The petition for a writ of certiorari was filed on July 16, 1976. The jurisdiction of the Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the Director of the Census and the Attorney General properly construed the coverage formula of Section 4 of the Voting Rights Act of 1965,

as amended by Pub. L. 94-73, 42 U.S.C. (and Supp. V) 1973b, in determining that the State of Texas is subject to its provisions.

2. Whether the two courts below correctly declined to determine the constitutionality of the language minority provisions of the Voting Rights Act as amended in 1975, on the ground that petitioners did not seek to convene a three-judge district court.

STATUTES INVOLVED

Pertinent portions of Section 4 of the Voting Rights Act of 1965, as amended by Pub. L. 94-73, 42 U.S.C. (and Supp. V) 1973b, are set forth in the Appendix, *infra*.

STATEMENT

Petitioners, the Governor and Secretary of State of Texas, instituted this action against the Attorney General of the United States, the Director of the Census and other federal officials seeking a temporary restraining order, and preliminary and permanent injunctive and declaratory relief, with respect to their obligations under the language minority provisions of Section 4 of the Voting Rights Act of 1965, as amended by Pub. L. 94-73, 42 U.S.C. (Supp. V) 1973b. Petitioners contended that the Attorney General and the Director of the Census incorrectly determined that the State of Texas became subject to the provisions of Section 4 of the Voting Rights Act of 1965, 42 U.S.C. 1973b, by virtue of the 1975 amendments thereto.[1] Petitioners alleged,

[1]Section 4, as amended by the Act of August 6, 1975, Pub. L. 94-73, 89 Stat. 400-402, provides that a jurisdiction shall be subject to certain remedial provisions of the Act if it is determined by the Director of the Census and the Attorney General, respectively, that more than five percent of the voting age citizens of the jurisdiction are members of a single language minority, and that the jurisdiction provided any election materials or information only in English as of November 1972; and if it is determined by the Director of the Census that less than 50 per centum of the citizens of voting age were registered or that less than 50 per centum of such persons voted in the presidential election of 1972.

among other things, that they were entitled to a hearing prior to the determination by the Director of the Census and the Attorney General that the State of Texas was covered by Section 4 of the Act; that the Director of the Census had used inaccurate data in computing the number of citizens of voting age in Texas; that the Director misconstrued the 50 per centum portion of the Section 4 coverage formula; and, finally, that the Attorney General had misconstrued Section 4(d) of the Act. Petitioners asserted that if the Director and the Attorney General had not committed these errors, the State of Texas would not be determined to be covered by Section 4 of the Act. Petitioners did not request that a three-judge district court be convened under 28 U.S.C. 2282.

The single-judge district court granted the defendants summary judgment after hearing argument on their motion to dismiss and plaintiffs' motion for preliminary injunction. The district court ruled that neither the Voting Rights Act nor the Administrative Procedure Act, 5 U.S.C. 551 *et seq.*, afforded petitioners the right to an administrative hearing, and that, with regard to each of the issues of statutory construction raised by the plaintiffs, the interpretation of the Director of the Census was "rational, consistent with the purposes and meaning of the statute and consistent with the legislative history" (Pet. App. B-5 to B-6). The court declined to rule on any constitutional issues raised by the plaintiffs because it lacked jurisdiction (Pet. App. B-6), and

refrained from ruling on the issues raised regarding the Attorney General's determination because the Attorney General had not yet made that determination (*ibid.*)

The court of appeals unanimously affirmed. The court ruled that, to the extent that petitioners sought to enjoin application to Texas of the language minority provisions of the Voting Rights Act on the ground that a hearing was constitutionally required, the court lacked jurisdiction because such relief may be granted only by a three-judge district court subject to direct appeal to this Court (Pet. App. A-13). The court further ruled that neither the Voting Rights Act nor the Administrative Procedure Act provides for a hearing prior to the making of the determinations required by Section 4 of the Voting Rights Act (Pet. App. A-12 to A-17), and, indeed, that such a requirement would be inconsistent with the basic thrust of the Voting Rights Act (Pet. App. A-16). The court also ruled that the Director of the Census had correctly interpreted the Section 4 coverage formula (Pet. App. A-17 to A-37), and that the Attorney General had correctly interpreted Section 4(d) of the Act (Pet. App. A-37 to A-40).[2]

ARGUMENT

The court of appeals correctly rejected petitioners' challenges to the respondents' interpretation and implementation of the Voting Rights Act Amendments.

---

[2]At the time of the hearing in the district court the Attorney General had not determined and, with the Director of the Census, published in the Federal Register, that Texas was covered by the Act. Such publication, by law, makes the determination effective. 42 U.S.C. 1973b(b). That determination was published on September 23, 1975, 40 Fed. Reg. 43746, after the decision of the district court. The court of appeals held that because requiring a new law suit would burden the parties and waste judicial resources, and the issue was purely one of law, it would consider petitioners' claims regarding the Attorney General's determination, within the limits of its jurisdiction (Pet. App. A-38).

Since the court's construction of the Amendments is consistent with the intent of the Congress and applicable decisions of this Court, and is not in conflict with any decision of any other court of appeals, review by this Court is not warranted.

1. Petitioners contend (Pet. 8-17) that the Director of the Census and the Attorney General misconstrued portions of Section 4 of the Voting Rights Act, as amended, in determining that the State of Texas is covered by its provisions. These contentions are without merit, as shown by the comprehensive opinion of the court of appeals, upon which we rely.

Petitioners argue that they are entitled to some form of an administrative hearing with regard to coverage under the Voting Rights Act (Pet. 19-22). As the opinion of the court of appeals indicates, there is neither an explicit nor implicit statutory right to an administrative hearing regarding coverage under Section 4 (Pet. App. A-14 to A-17). Indeed, the court concluded that to find otherwise would be "incongruous" and "inconsistent" with the purpose of the Act (Pet. App. A-15 to A-16).

Petitioners also claim that the Director of the Census miscounted the number of aliens in Texas and as a result erroneously concluded that Texas fell within the mathematical coverage formula of Section 4. They rely upon various non-Census estimates (Pet. 22-26). As the court below correctly recognized, however, Congress knew that all demographic data are imperfect. It determined, therefore, that the Director of the Census should rely upon his own data in making the computations necessary to determine coverage under the Act, because those data were at least based upon projections from an actual count (Pet. App. A-21). The court also found ample ground for concluding that the Director had given

proper consideration to the status of aliens in making his computations for purposes of Section 4 (Pet. App. A-23).

Petitioners also challenge (Pet. 8-13) the Director of the Census' interpretation of the portion of Section 4 which requires him to determine

> * * * that less than 50 per centum of the citizens of voting age were registered on November 1, 1972, or that less than 50 per centum of such persons voted in the Presidential election of November 1972.

The Director of the Census has consistently interpreted the term "such persons" in the second clause, to refer back to "citizens of voting age" in the first clause. Under this construction of the provision in issue and similar portions of Section 4, a state comes within the coverage formula if either of two conditions is met: (1) less than half its total citizens of voting age were registered, or (2) less than half of its total citizens of voting age actually voted (Pet. App. 24). Petitioners contend (Pet. 8-13) that this construction makes the first clause meaningless, because no jurisdiction could ever be covered by the first clause without also being covered by the second. They urge therefore that the second clause refers not to half the state's voting age population who voted, but to half the state's registered voters who actually voted.[3] As the opinion of the court of appeals demonstrates, petitioners' interpretation is contrary to the legislative intent as shown by the history of the Act as originally passed in 1965 (Pet. App. A-28 to A-37). The Director's construction is supported by the testimony of the Attorney General and the Director of the

[3]In Texas more than half the state's voting age population was registered, but less than half actually voted on November 1, 1972. On the other hand, more than half of all registered voters voted on that day (Pet. 9-10).

Census during the Senate hearings in 1965 (Pet. App. A-29 to A-30). It is also supported by the interpretation given this provision by the United States Commission on Civil Rights (Pet. App. A-36). Finally, it is consistent with the application of this provision by this Court (Pet. App. A-36 and n. 68). See *South Carolina* v. *Katzenbach*, 383 U.S. 301, 330.[4]

Petitioners argue (Pet. 13-17) that the Attorney General erred in refusing to apply Section 4(d) of the Voting Rights Act (App., *infra*, p. 4a) when making his determination whether the State of Texas is covered by Section 4. As the opinion of the court of appeals demonstrates (Pet. App. A-37 to A-40), Section 4(d) was not intended to apply to an initial coverage determination, but rather to a judicial determination under Section 4(a) of the Act that coverage should be terminated. This holding is firmly supported by the legislative history of the provision (Pet. App. A-39 to A-40).

2. Petitioners contend (Pet. 17-28) that even if the Director of the Census and the Attorney General properly construed the coverage provisions of the Voting Rights Act, as amended, the Act "is not appropriate legislation to enforce the privileges and immunities guaranteed by the Fourteenth Amendment" (*id.* at 17). Petitioners asserted challenges to the constitutionality of the Voting Rights Act in both courts below, but never requested

[4]Petitioners' proposed construction of the Section 4 coverage provisions of the Act—unchanged since the initial 1965 enactment—would have excluded the States of Georgia, Louisiana, and South Carolina from the coverage of the Act. This Court explicitly noted the Congress' contrary intention with respect to these three States (*South Carolina* v. *Katzenbach*, *supra*, 383 U.S. at 330) and, as the court of appeals stated, "[s]imilarly, the Congress clearly contemplated that Texas would be covered by the 1975 Amendments" (Pet. App. A-26 to A-27 and n. 54).

the convening of a three-judge court. The district court therefore refused to hear the constitutional issues (Pet. App. B-6). The court of appeals likewise ruled that it lacked jurisdiction (Pet. App. A-13 and n. 29):

> By statute, all applications for an injunction against the execution of an Act of Congress which is alleged to be unconstitutional must be heard in the first instance by a three judge district court. 28 U.S.C. §2282 (1970). * * * Since there was no such application here, the issue of constitutionality cannot properly be reviewed on the merits by this Court * * * .

Petitioners do not challenge the refusal of the courts below, on jurisdictional grounds, to consider their allegations that the Voting Rights Act, as amended, is unconstitutional. Instead, they merely assert these allegations again. The courts below correctly held that they lacked jurisdiction to grant injunctive relief on constitutional grounds. 28 U.S.C. 2282. Therefore the merits of petitioners' constitutional claims are not properly before this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

J. STANLEY POTTINGER,
Assistant Attorney General.

CYNTHIA ATTWOOD,
Attorney.

OCTOBER 1976.

DOJ-1976-10

APPENDIX

Voting Rights Act of 1965, 79 Stat. 438, as amended by the Act of June 22, 1970, 84 Stat. 315, and the Act of August 6, 1975, Pub. L. 94-73, 89 Stat. 400-402, 42 U.S.C. (and Supp. V) 1973 *et seq.*:

SEC. 4. (a) To assure that the right of citizens of the United States to vote is not denied or abridged on account of race or color, no citizen shall be denied the right to vote in any Federal, State, or local election because of his failure to comply with any test or device in any State with respect to which the determinations have been made under the first two sentences of subsection (b) or in any political subdivision with respect to which such determinations have been made as a separate unit, unless the United States District Court for the District of Columbia in an action for a declaratory judgment brought by such State or subdivision against the United States has determined that no such test or device has been used during the seventeen years preceding the filing of the action for the purpose or with the effect of denying or abridging the right to vote on account of race or color. *Provided,* That no such declaratory judgment shall issue with respect to any plaintiff for a period of seventeen years after the entry of a final judgment of any court of the United States, other than the denial of a declaratory judgment under this section, whether entered prior to or after the enactment of this Act, determining that denials or abridgments of the right to vote on account of race or color through the use of such tests or devices have occurred anywhere in the territory of such plaintiff. No citizen shall be denied the right to vote in any Federal, State, or local election because of his failure to comply with any test or device in any State with respect to which the determinations have been

made under the third sentence of subsection (b) of this section or in any political subdivision with respect to which such determinations have been made as a separate unit, unless the United States District Court for the District of Columbia in an action for a declaratory judgment brought by such State or subdivision against the United States has determined that no such test or device has been used during the ten years preceding the filing of the action for the purpose or with the effect of denying or abridging the right to vote on account of race or color, or in contravention of the guarantees set forth in section 4(f)(2): *Provided,* That no such declaratory judgment shall issue with respect to any plaintiff for a period of ten years after the entry of a final judgment of any court of the United States, other than the denial of a declaratory judgment under this section, whether entered prior to or after the enactment of this paragraph, determining that denials or abridgments of the right to vote on account of race or color, or in contravention of the guarantees set forth in section 4(f)(2) through the use of tests or devices have occurred anywhere in the territory of such plaintiff.

An action pursuant to this subsection shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of title 28 of the United States Code and any appeal shall lie to the Supreme Court. The court shall retain jurisdiction of any action pursuant to this subsection for five years after judgment and shall reopen the action upon motion of the Attorney General alleging that a test or device has been used for the purpose or with the effect of denying or abridging the right to vote on account of race or color, or in contravention of the guarantees set forth in section 4(f)(2).

If the Attorney General determines that he has no reason to believe that any such test or device has been used during the seventeen years preceding the filing of an action under the first sentence of this subsection for the purpose or with the effect of denying or abridging the right to vote on account of race or color, he shall consent to the entry of such judgment.

If the Attorney General determines that he has no reason to believe that any such test or device has been used during the ten years preceding the filing of an action under the second sentence of this subsection for the purpose or with the effect of denying or abridging the right to vote on account of race or color, or in contravention of the guarantees set forth in section 4(f)(2), he shall consent to the entry of such judgment.

(b) The provisions of subsection (a) shall apply in any State or in any political subdivision of a state which (1) the Attorney General determines maintained on November 1, 1964, any test or device, and with respect to which (2) the Director of the Census determines that less than 50 per centum of the persons of voting age residing therein were registered on November 1, 1964, or that less than 50 per centum of such persons voted in the presidential election of November 1964. On and after August 6, 1970, in addition to any State or political subdivision of a State determined to be subject to subsection (a) pursuant to the previous sentence, the provisions of subsection (a) shall apply in any State or any political subdivision of a State which (i) the Attorney General determines maintained on November 1, 1968, any test or device, and with respect to which (ii) the Director of the Census determines that less than 50 per centum of the persons of voting age residing therein were registered on November 1, 1968, or that less than 50 per centum of such persons voted in

the presidential election of November 1968. On and after August 6, 1975, in addition to any State or political subdivision of a State determined to be subject to subsection (a) pursuant to the previous two sentences, the provisions of subsection (a) shall apply in any State or any political subdivision of a State which (i) the Attorney General determines maintained on November 1, 1972, any test or device, and with respect to which (ii) the Director of the Census determines that less than 50 per centum of the citizens of voting age were registered on November 1, 1972, or that less than 50 per centum of such persons voted in the Presidential election of November 1972.

A determination or certification of the Attorney General or of the Director of the Census under this section or under section 6 or section 13 shall not be reviewable in any court and shall be effective upon publication in the Federal Register.

* * * * *

(d) For purposes of this section no State or political subdivision shall be determined to have engaged in the use of tests or devices for the purpose or with the effect of denying or abridging the right to vote on account of race or color, or in contravention of the guarantees set forth in section 4(f)(2) if (1) incidents of such use have been few in number and have been promptly and effectively corrected by State or local action, (2) the continuing effect of such incidents has been eliminated, and (3) there is no reasonable probability of their recurrence in the future.

* * * * *

(f) (1) The Congress finds that voting discrimination against citizens of language minorities is pervasive and national in scope. Such minority citizens are from

environments in which the dominant language is other than English. In addition they have been denied equal educational opportunities by State and local governments, resulting in severe disabilities and continuing illiteracy in the English language. The Congress further finds that, where State and local officials conduct elections only in English, language minority citizens are excluded from participating in the electoral process. In many areas of the country, this exclusion is aggravated by acts of physical economic, and political intimidation. The Congress declares that, in order to enforce the guarantees of the fourteenth and fifteenth amendments to the United States Constitution, it is necessary to eliminate such discrimination by prohibiting English-only elections, and by prescribing other remedial devices.

(2) No voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any State or political subdivision to deny or abridge the right of any citizen of the United States to vote because he is a member of a language minority group.

(3) In addition to the meaning given the term under section 4(c), the term "test or device" shall also mean any practice or requirement by which any State or political subdivision provided any registration or voting notices, forms, instruction, assistance, or other materials or information relating to the electoral process, including ballots, only in the English language, where the Director of the Census determines that more than five per centum of the citizens of voting age residing in such State or political subdivision are members of a single language minority. With respect to section 4(b), the term "test or device", as defined in this subsection, shall be employed only in making the determinations under the third sentence of that subsection.

(4) Whenever any State or political subdivision subject to the prohibitions of the second sentence of section 4(a) provides any registration or voting notices, forms, instructions, assistance, or other materials or information relating to the electoral process, including ballots, it shall provide them in the languge of the applicable language minority group as well as in the English language: *Provided*, That where the language of the applicable minority group is oral or unwritten, the State or political subdivision is only required to furnish oral instructions, assistance, or other information relating to registration and voting.